STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of MENOMONEE FALLS SCHOOL DISTRICT Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and MENOMONEE FALLS EDUCATION ASSOCIATION	Case XL No. 31689 DR(M)-309 Decision No. 21199

Appearances:

Mulcahy and Wherry, S.C., Attorneys and Counselors at Law, 815 East Mason Street, Suite 1600, Milwaukee, Wisconsin 53202-4080, by Ms. Diana L. Waterman and Mr. Mark L. Olson, on behalf of the District.

Mr. Michael L. Stoll, Staff Counsel, Wisconsin Education Association Council, 101 West Beltline Highway, P.O. Box 8003, Madison, Wisconsin 53708, on behalf of the Union.

FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER DISMISSING PETITION FOR DECLARATORY RULING

On June 6, 1983, the Menomonee Falls School District filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., regarding its duty to bargain with the Menomonee Falls Education Association over certain portions of a 1981-1983 collective bargaining agreement between those parties. During bargaining on a successor agreement the Association subsequently notified the District that it did not propose to include the challenged provisions from the parties' 1981-1983 contract in a successor agreement and submitted revised replacement proposals to the District. On August 11, 1983 the District filed an amended petition for declaratory ruling with the Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats. as to its duty to bargain with the Menomonee Falls Education Association over certain aspects of the revised contract proposals submitted by the Association. By letter dated September 14, 1983, the Association informed the District that it was deleting the portions of its revised proposals to which the District had objected in its August 11, 1983 amended petition for declaratory ruling. On September 16, 1983, the Association filed with the Commission a statement in response to amended petition for declaratory ruling and a motion to dismiss. The District responded to said motion on October 5 and November 7, 1983, and the Association replied thereto on November 10, 1983. Having considered the parties' positions, the Commission makes and issues the following

FINDINGS OF FACT

1. That the Menomonee Falls School District, herein the District, is a municipal employer which operates a public school system and which has its principal offices at N84 W16579 Menomonee Avenue, Menomonee Falls, Wisconsin 53051.

2. That the Menomonee Falls Education Association, herein the Association, is a labor organization and the exclusive collective bargaining representative of certain professional teaching employes of the District.

3. That the District and the Association were parties to a collective bargaining agreement which by its terms was to expire on August 9, 1983, and which established the wages, hours, and conditions of employment of those teachers employed by the District and represented by the Association.

4. That on June 6, 1983 the District filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., as to the District's duty to bargain with the Association as to certain portions of the parties' existing collective bargaining agreement.

5. That during bargaining subsequent to the filing of the petition for declaratory ruling, the Association submitted proposals to the District wherein it modified the portions of the parties' 1981-1983 contract which were the subject of the District's petition.

6. That on August 11, 1983, the District filed an amended petition with the Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., as to its duty to bargain with respect to certain portions of the revised proposals submitted by the Association.

7. That on or about September 14, 1983, the Association notified the District that it was deleting from its revised proposals those portions which the District had objected to in its August 11, 1983 amended petition.

8. That on September 16, 1983, the Association filed a motion to dismiss petition with the Commission wherein it asserted that there was no dispute between the parties concerning the duty to bargain over the various contract provisions and proposals challenged by the District in its June 6 and August 11 petitions.

9. That on October 5 and November 7, 1983, the District submitted its response to the Association's motion to dismiss, wherein it contended that there remained a dispute between the parties despite the Association's actions to remove the challenged contract provisions and proposals from the Association's current bargaining proposals.

Based upon the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSION OF LAW

1. That there is no dispute within the meaning of Sec. 111.70(4)(b), Stats., between the Menomonee Falls School District and the Menomonee Falls Education Association with respect to the parties' duty to bargain over the contract provisions and bargaining proposals challenged in the District's June 6 and August 11, 1983 petitions for declaratory ruling.

Based upon the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes and issues the following

ORDER 1/

That the District's petitions for declaratory ruling be, and the same hereby are, dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 18th day of November, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Gary L. Covelli, Commissioner

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Marshall L. Gratz, Commissioner

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by (Footnote continued on Page Three)

1/ (Continued)

following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT CONCLUSION OF LAW AND ORDER DISMISSING PETITION FOR DECLARATORY RULING

The issue before the Commission is whether there is a "dispute . . . concerning the duty to bargain" within the meaning of Sec. 111.70(4)(b), Stats., when the Association does not propose to include in a successor agreement any of the language challenged by the District in its petitions for declaratory ruling. If such a "dispute" remains, the Association's motion to dismiss must be denied and the Commission will proceed with the processing of the petition. If no such "dispute . . . concerning the duty to bargain" remains, then the motion to dismiss must be granted.

POSITIONS OF THE PARTIES

In support of its motion, the Association argues that the District's right to obtain a declaratory ruling under Sec. 111.70(4)(b), Stats. exists only with respect to subjects over which there exists a "dispute" between the District and the Association over the "duty to bargain." It argues that a condition precedent to the issuance of a declaratory ruling under this statute is the existence of an actual dispute or controversy which needs to be resolved by the Commission in order for the municipal employer and the exclusive representative of its employes to bargain. The Association contends that as it is not asking the District to bargain with respect to the language challenged by the District in the petitions for declaratory ruling, there can be no "dispute" between the parties in this case. The Association notes that it has deleted all twenty-five proposals challenged by the District in the June 6 petition and submitted revised proposals in lieu thereof. In addition, the Association notes that it has agreed to delete from its proposals for a successor agreement those aspects of its revised contract proposals which the District challenged as permissive in its August 11, 1983 amended petition. The Association states that it does not dispute the District's allegation that the District has no present duty to bargain with respect to all of the subjects challenged in the District's petition and amended petition, and further asserts that said subjects will not be part of the mediation-arbitration process nor will they be included in any successor contract unless the District proposes their inclusion. If the Association is not demanding to bargain over the subjects challenged in the District's petition and amended petition, and if the Association is not proposing that those challenged provisions be included in the parties' succcessor collective bargaining agreement, the Association believes that it logically follows that no "dispute" can exist between the parties concerning the "duty to bargain" with respect to those items. Therefore the Association contends that the District has no right to obtain such a declaratory ruling in this case.

The Association asserts that if the Commission fails to grant its motion to dismiss, the Commission will necessarily waste resources, foster use of the declaratory ruling process as a delaying tactic in bargaining, and significantly interfere with the right of municipal employes to engage in meaningful collective bargaining and to utilize a "fair speedy effective" procedure for settling impasses in that bargaining, contrary to the legislative policy declaration in Secs. 111.70(2) and (6), Stats. The Association contends that if the Commission must render what will be essentially an "advisory" ruling as to the challenged language, significant delays will necessarily occur in the resolution of actual "disputes" to the serious detriment of both the parties to those disputes and the effective administration of the Municipal Employment Relations Act. Lastly, the Association asserts that the District is not entitled to a declaratory ruling with respect to prior contract provisions which the Association is not proposing to include in a successor agreement simply because the District wishes to justify to a mediator-arbitrator its contemplated contract "takebacks" on the basis of "stated WERC policy," rather than on the basis of a demonstrated need to eliminate those provisions from the parties' agreement.

The District contends that the motion to dismiss should not be granted because, despite the Association's decision to remove the disputed provisions from the bargaining table, there remains a "dispute" between the parties' respect to the duty to bargain which should appropriately be resolved by the issuance of a

declaratory ruling pursuant to Sec. 111.70(4)(b), Stats. The District asserts that the Association has failed to focus upon the objective of the District's petitions. The District asserts that consistent with the intent of Sec. 111.70(4)(b), Stats. it seeks only to "evaporate" from the contract certain "permissive" language over which it has no duty to bargain. Simply put, the District contends that unless there is an admission/stipulation by the Association or a ruling by the Commission regarding the "permissive" nature of the challenged language, a dispute will continue to exist regarding the mandatory/permissive nature of the language. Indeed, the District argues that the Association has consistently failed to file the requisite statement in response to petition wherein it would admit or deny that it had a duty to bargain over the challenged matters. It asserts that until the Association complies with its obligation under ERB 18.03, it cannot be determined whether a dispute exists. The District also draws the Commission's attention to that portion of Sec. 111.70(4)(b), Stats. which it asserts gives it a right to a declaratory ruling as to a "dispute . . . on any subject."

The District asserts that although the Association does not wish to propose that the challenged language be contained in a successor agreement, the Association, at the same time, alleges that the District will be committing a breach of the duty to bargain in the event that the District "evaporates" provisions from the expired agreement which the Association believes are mandatory subjects of bargaining. The District contends that if a ruling is not forthcoming from the Commission as to those portions of the expired agreement which are challenged in the District's petition, there is the potential that the Commission will receive the current dispute between the parties in the form of a future prohibited practice complaint. Under such circumstances, the District argues that a dismissal of the instant petitions would neither be judicious, nor in keeping with the statutory mandate that the Commission issue a declaratory ruling in the event that there is a dispute ". . . concerning the duty to bargain on <u>any subject"</u> (emphasis added). The District also notes that the Association could resurrect the language which it now contends it does not wish to place in a successor agreement and, under those circumstances, no valid purpose would be served by dismissal of the instant petitions.

Finally, the District contends that issuance of a declaratory ruling as to the challenged portions of the expired agreement is appropriate so that the District can accurately formulate its final offer if the parties cannot reach agreement on a new contract. If the provisions are deemed permissive, then the District's final offer need not address the status of those provisions in a successor agreement because they will have "evaporated" as a matter of law. However, if the mandatory/permissive status of the provisions is left unresolved, the District asserts that it will be left with no guidance when constructing its final offer. It argues that it ought not be required to bear the burden of establishing the need for the deletion of language from the parties' contract when such language, if permissive, will have been deleted through "evaporation" and not through the collective bargaining process.

<u>DISCUSSION</u>

In <u>Milwaukee Board of School Directors,</u> 17504 (12/79), the Commission was confronted with the question of whether it should issue a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., as to certain proposals over which the District had waived its right to object during the course of the parties' negotiations. In that decision the Commission made the following comments:

> It is not possible to state at this juncture whether the petitions are moot with regard to any or all of the non-disputed items. As MTEA correctly points out, there is substantial case law to the effect that a labor dispute is not moot merely because the parties have settled the matter for the term of a collective bargaining agreement. Therefore, we wish to make it clear that our dismissal is not based on mootness.
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> With regard to the question of jurisdiction we, likewise, agree with MTEA that we have jurisdiction to issue a declaratory ruling on the non-disputed items. However, that jurisdiction is based on a significantly different interpretation of the relevant statutes than that which is advanced by MTEA.

> Section 111.70(4)(b), Stats., provides that the Commission is required to issue a declaratory ruling whenever a dispute arises to bargain on any subject. That provision, which provides that decisions should be issued within fifteen days of submission, obviously contemplates disputes which obstruct the collective bargaining process which now includes mediation-arbitration. We cannot accept MTEA's claim that the legislature, in enacting Section 111.70(4)(cm)6.g. Stats., intended to provide that the mediation-arbitration process could be interrupted by the filing of a petition pursuant to Section 111.70(4)(b), Stats., because a "question" arose in collective bargaining which was not also a "dispute" within the meaning of Section 111.70(4)(b), Stats. To conclude otherwise would be to allow a party who had a proposal in bargaining, the mandatory nature of which the other party "questioned" but did not "object to" under Section 111.70(4)(cm)6. a. Stats., and ERB 31.11 Wis. Admin. Code, to delay the mediation-arbitration process by the simple expedient of filing a petition for declaratory ruling.
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> We conclude that we have jurisdiction to issue a declaratory ruling on any of the non-disputed items which are not moot but not pursuant to the provisions of Section 111.70(4)(b) or Section 111.70(4)(cm)6.g., Stats. Our jurisdiction to do so would stem from the provisions of Section 227.06, Stats. It is our determination not to issue a declaratory ruling pursuant to the discretionary authority granted to us under that section for the sound reasons advanced by the Board in its brief.

We believe that the rationale quoted above is applicable herein. When a party withdraws portions of an existing proposal or indicates that it does not propose to include portions of an expired contract in a successor agreement, we do not believe that there is presently a "dispute" within the meaning of Sec. 111.70(4)(b), Stats. as to the "duty to bargain" as to a successor agreement. We cannot concur with the District's argument that a dispute exists until the Association agrees that language it is no longer proposing is permissive. A contrary conclusion would, as our prior above-quoted holding indicates, subject the mediation-arbitration process to delays which we believe are contrary to the intent of the Legislature when it passed Sec. 111.70(4)(cm)6.g., Stats., (which incorporates Sec. 111.70(4)(b), Stats., by its terms). Such questions can, of course, be submitted to the Commission in the form of a Sec. 227.06, Stats., petition for declaratory ruling. Under that provision, whether the Commission hears and decides the matter is discretionary. Should the Association propose during the course of the parties' future negotiations over a successor to the 1981-1983 contract that any of the challenged language be placed in such a contract, the District would, of course, have the right to file a new petition for declaratory ruling pursuant to Sec. 111.70(4)(b), Stats. seeking a Commission determination as to the duty to bargain over such a proposal.

We also reject the District's contention that the need for final offer "guidance" constitutes a "dispute" under Sec. 111.70(4)(b), Stats. Should final offers become necessary, we believe that the District will be able to indicate therein the status of the language without a declaratory ruling from the Commission. Assuming the District does not wish to propose the continued existence of the challenged language, it need only leave it out of its final offer. The burden, if any, which the District may bear before a mediator-arbitrator in such circumstances does not create a "dispute . . . concerning the duty to bargain."

We agree with the District that Sec. 111.70(4)(b), Stats., is intended in part to resolve disputes concerning the duty to bargain so that the dispute need not escalate into conduct that becomes the subject of prohibited practice proceedings. However, in our view, the "dispute . . . concerning the duty to bargain on any subject" to which Sec. 111.70(4)(b), Stats., applies must concern the existence or non-existence of a present duty to bargain on any subject. Here, the Association's unwillingness to concede that certain language in the expired agreement is non-mandatory in nature (and its accompanying threat of prohibited practice proceedings in the event the District unilaterally changes any mandatory subjects without bargaining) do not amount to a dispute about the existence of a

present District duty to bargain about the subjects referred to in the petition. The Association's positions, instead, present the possibility of a dispute at some future time as to the existence or non-existence of a District duty to bargain about those subjects at that time. Indeed, if we were to reach the merits of the petition in the present circumstances, we would undoubtedly conclude that the District has no present duty to bargain about the subjects referred to in the petition because the Association is not proposing inclusion of the language involved in the successor agreement and because the Association is acknowledging that the District has no present duty to bargain about those subjects.

If, in the future, the District were to support a petition for a Sec. 111.70(b)(b), Stats. declaratory ruling with a showing, for example, that it had given notice to the Association of an intention to take certain action and was, in response to that notification, presented with an Association demand to bargain about the subject, then the case would be in a materially different posture. On the present record, however, there is no dispute between the parties concerning the present duty to bargain on the subjects referred to in the petition. The Sec. 111.70(4)(b), Stats., procedure is not, in our view, available to resolve, at present, possible disputes about the existence or non-existence of a District duty to bargain about a subject that may arise at some time in the future in materially different circumstances than presently exist.

We would also note that where, as here, the Association chooses to respond to a petition for declaratory ruling by taking the challenged language off the bargaining table, thereby removing a "dispute," it has met its obligation under ERB 18.03 as it has removed the necessity for further proceedings.

Dated at Madison, Wisconsin this 18th day of November, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Gary L. Covelli, Commissioner

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Marshall L. Gratz, Commissioner